

AMENDED IN ASSEMBLY MAY 6, 2009

CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

**ASSEMBLY BILL**

**No. 471**

---

**Introduced by Assembly Member Nava**

February 24, 2009

---

*An act to amend Sections 11040, 11041, and 11045 of, to add Section 11046 to, to repeal Section 11043 of, and to repeal and add Section 11042 of, the Government Code, relating to legal services. An act to amend Sections 11040 and 11042 of, and to add Sections 11042.1, 11042.2, 11042.3, and 11046 to, the Government Code, relating to legal services.*

LEGISLATIVE COUNSEL'S DIGEST

AB 471, as amended, Nava. Legal services.

Existing law requires certain state entities to obtain written consent from the Attorney General before employing legal counsel in any judicial proceeding.

*This bill would recast these provisions and specifically authorize a state agency, as defined, to use in-house legal counsel in a noncivil litigation matter, define terms for their purposes, and state several factors the Attorney General may consider when considering consenting to a state agency, commissioner, or officer employing in-house counsel or outside counsel, as defined.*

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1     *SECTION 1. Section 11040 of the Government Code is*  
2     *amended to read:*

3     11040. (a) This article does not affect the right of any state  
4     agency or employee to employ counsel in any matter of the state,  
5     after first having obtained the written consent of the Attorney  
6     General.

7     (b) It is the intent of the Legislature that overall efficiency and  
8     economy in state government be enhanced by employment of the  
9     Attorney General as counsel for the representation of state agencies  
10    and employees in judicial and other proceedings.

11    The Legislature finds that it is in the best interests of the people  
12    of the State of California that the Attorney General be provided  
13    with the resources needed to develop and maintain the Attorney  
14    General's capability to provide competent legal representation of  
15    state agencies and employees in any judicial proceeding.

16    (c) Except with respect to employment by the state officers and  
17    agencies specified by title or name in Section 11041 or when  
18    specifically waived by statute other than Section 11041, the written  
19    consent of the Attorney General is required prior to employment  
20    of *outside* counsel for representation of any state agency or  
21    employee in any judicial *or other* proceeding.

22    *SEC. 2. Section 11042 of the Government Code is amended to*  
23    *read:*

24    11042. ~~No~~A state agency, commissioner, or officer ~~shall~~ may  
25    employ ~~any in-house~~ legal counsel ~~other than~~ to provide legal  
26    advice. However, only the Attorney General, or one of his or her  
27    assistants or deputies, ~~in any matter~~ shall represent a state agency,  
28    commissioner, or officer in a judicial or other proceeding in which  
29    the agency, commissioner, or officer is interested, or is a party as  
30    a result of office or official duties, *unless express written consent*  
31    *is given by the Attorney General.*

32    *SEC. 3. Section 11042.1 is added to the Government Code, to*  
33    *read:*

34    11042.1. *Nothing in this article prohibits the Attorney General*  
35    *from providing a state agency, commissioner, or officer, with legal*  
36    *advice outside the context of a judicial or other proceeding, as*  
37    *defined in Section 11046.*

1     *SEC. 4. Section 11042.2 is added to the Government Code, to*  
2     *read:*

3     *11042.2. When the Attorney General consents to a state agency,*  
4     *commissioner, or officer employing in-house counsel or outside*  
5     *counsel in a judicial or other proceeding, the Attorney General*  
6     *shall retain authority to intervene in the proceeding or appear as*  
7     *amicus curiae to the extent permitted by law.*

8     *SEC. 5. Section 11042.3 is added to the Government Code, to*  
9     *read:*

10    *11042.3. In determining whether to give consent to a state*  
11    *agency, commissioner, or officer to employ in-house counsel or*  
12    *outside counsel in a judicial or other proceeding, and the extent*  
13    *of such consent, the Attorney General may consider the factors of*  
14    *conflicts of interest, the staffing needs of the Office of the Attorney*  
15    *General, and the availability of subject matter expertise.*

16    *SEC. 6. Section 11046 is added to the Government Code, to*  
17    *read:*

18    *11046. For purposes of this article and unless otherwise*  
19    *specifically stated, the following definitions shall apply:*

20    (i) *“In-house counsel” means a licensed attorney employed in*  
21    *state service by a state agency and represented by State Bargaining*  
22    *Unit 2.*

23    (ii) *“Judicial and other proceedings” means litigation in a civil*  
24    *court, an administrative adjudicatory proceeding governed by the*  
25    *Administrative Procedure Act (Chapter 4 (commencing with*  
26    *Section 11370)) or by the United States Administrative Procedure*  
27    *Act (5 U.S.C. 551, et seq.), or an arbitration proceeding.*

28    (iii) *“Outside counsel” means an attorney licensed to practice*  
29    *law that does not otherwise meet the definition of subdivision (a).*

30    ~~SECTION 1. Section 11040 of the Government Code is~~  
31    ~~amended to read:~~

32    ~~11040. (a) It is the intent of the Legislature that overall~~  
33    ~~efficiency and economy in state government is enhanced by the~~  
34    ~~employment of the Attorney General as the legal counsel for~~  
35    ~~representation of every state agency in civil litigation.~~

36    ~~(b) The Legislature finds that it is in the best interests of the~~  
37    ~~state to provide the Attorney General with the resources needed~~  
38    ~~to develop and maintain the Attorney General’s capability to~~  
39    ~~provide competent legal representation of every state agency.~~

1     ~~SEC. 2. Section 11041 of the Government Code is amended~~  
2     ~~to read:~~

3     ~~11041. (a) Only the Attorney General, or an assistant or deputy~~  
4     ~~of the Attorney General, shall act as the legal counsel to a state~~  
5     ~~agency in civil litigation, unless the employment of outside counsel~~  
6     ~~is expressly authorized under this section or another provision of~~  
7     ~~law.~~

8     ~~(b) (1) The Attorney General, in his or her discretion, may~~  
9     ~~authorize a state agency to employ outside legal counsel to act on~~  
10    ~~behalf of the state agency in civil litigation. The Attorney General's~~  
11    ~~authorization under this paragraph shall only be effective if it is~~  
12    ~~express and in writing.~~

13    ~~(2) The Attorney General may withdraw authorization granted~~  
14    ~~under paragraph (1) at any time and in any manner.~~

15    ~~(c) This section shall not apply to the Regents of the University~~  
16    ~~of California, the Trustees of the California State University, Legal~~  
17    ~~Division of the Department of Transportation, Division of Labor~~  
18    ~~Standards Enforcement of the Department of Industrial Relations,~~  
19    ~~Workers' Compensation Appeals Board, Public Utilities~~  
20    ~~Commission, State Compensation Insurance Fund, Legislative~~  
21    ~~Counsel Bureau, Inheritance Tax Department, Secretary of State,~~  
22    ~~State Lands Commission, Alcoholic Beverage Control Appeals~~  
23    ~~Board (except when the board affirms the decision of the~~  
24    ~~Department of Alcoholic Beverage Control), State Department of~~  
25    ~~Education, and Treasurer with respect to bonds, nor to any other~~  
26    ~~state agency which, by law enacted after Chapter 213 of the~~  
27    ~~Statutes of 1933, is authorized to employ legal counsel.~~

28    ~~(d) The Trustees of the California State University shall pay the~~  
29    ~~cost of employing legal counsel from their existing resources.~~

30    ~~SEC. 3. Section 11042 of the Government Code is repealed.~~

31    ~~SEC. 4. Section 11042 is added to the Government Code, to~~  
32    ~~read:~~

33    ~~11042. (a) A state agency may employ in-house legal counsel~~  
34    ~~in a noncivil litigation matter in which the state agency is interested~~  
35    ~~or is a party as a result of the official duties of the state agency.~~

36    ~~(b) The Attorney General may act as legal counsel to a state~~  
37    ~~agency in any matter, as he or she deems appropriate.~~

38    ~~SEC. 5. Section 11043 of the Government Code is repealed.~~

39    ~~SEC. 6. Section 11045 of the Government Code is amended~~  
40    ~~to read:~~

1 ~~11045. (a) (1) Whenever a state agency requests the~~  
2 ~~authorization of the Attorney General to employ outside counsel~~  
3 ~~as required by subdivision (b) of Section 11041, the state agency~~  
4 ~~shall, within five business days of the date the request is transmitted~~  
5 ~~to the Attorney General, provide the designated representative of~~  
6 ~~State Employees Bargaining Unit 2 with written notification of~~  
7 ~~the request. The notice shall include the items enumerated in~~  
8 ~~subdivision (d).~~

9 ~~(2) A state agency, other than the office of the Attorney General,~~  
10 ~~that is not required to obtain the authorization for employing~~  
11 ~~outside legal counsel as required by subdivision (b) of Section~~  
12 ~~11041, shall provide written notice of any proposed contract for~~  
13 ~~outside legal counsel to the designated representative of State~~  
14 ~~Employees Bargaining Unit 2 five business days prior to execution~~  
15 ~~of the contract by the state agency. The notice shall include the~~  
16 ~~items required by subdivision (d). In the event of an emergency~~  
17 ~~that requires the immediate employment of outside legal counsel,~~  
18 ~~the state agency shall provide the written notice no later than five~~  
19 ~~business days after the contract with outside legal counsel is signed.~~

20 ~~(3) Whenever the Attorney General determines the need to~~  
21 ~~employ outside legal counsel pursuant to subdivision (b) of Section~~  
22 ~~12520, the Attorney General shall give written notice to the~~  
23 ~~designated representative of State Employees Bargaining Unit 2~~  
24 ~~within 10 days of that determination. The notice shall include the~~  
25 ~~items enumerated in subdivision (d).~~

26 ~~(b) The Attorney General shall provide the designated~~  
27 ~~representative of State Employees Bargaining Unit 2 with a written~~  
28 ~~report, at least monthly, of all authorization granted to every state~~  
29 ~~agency pursuant to subdivision (b) of Section 11041.~~

30 ~~(c) Notwithstanding subdivisions (a) and (b), whenever a state~~  
31 ~~agency submits a proposed contract for outside legal counsel to~~  
32 ~~the Department of General Services pursuant to Section 10335 of~~  
33 ~~the Public Contract Code, the state agency shall provide a copy of~~  
34 ~~the contract to the designated representative of State Employees~~  
35 ~~Bargaining Unit 2.~~

36 ~~(d) "Written notice" within the meaning of this section shall~~  
37 ~~include, but not be limited to, all of the following:~~

38 ~~(1) A copy of the complaint or other pleadings, if any, that gave~~  
39 ~~rise to the litigation or matter for which a contract is being sought,~~  
40 ~~or other identifying information.~~

~~(2) The justification for the contract, pursuant to subdivision (b) of Section 19130.~~

~~(3) The nature of the legal services to be performed.~~

~~(4) The estimated hourly wage to be paid under the contract.~~

~~(5) The estimated length of the contract.~~

~~(6) The identity of the person or entity that is entering into the contract with the state.~~

~~(e) (1) The notice requirements of this section do not apply to contracts for expert witnesses or consultations in connection with a confidential investigation or to any confidential component of a pending or active legal action.~~

~~(2) The exemption authorized in paragraph (1) shall only apply as long as necessary to protect the confidentiality of the investigation or the confidential component of a pending or active legal action.~~

~~(3) Disclosures made pursuant to this section are deemed to be privileged communications for purposes of subdivision (e) of Section 912 of the Evidence Code, and shall not be construed to be a waiver of any privilege or exemption provided by law, including, but not limited to, the lawyer-client privilege, as described in Section 952 of the Evidence Code, or attorney work product, as described in Chapter 4 (commencing with Section 2018.010) of Title 4 of Part 4 of the Code of Civil Procedure.~~

~~(f) If the provisions of this section are in conflict with the provisions of a memorandum of understanding or other written agreement reached pursuant to Section 3517 or 3517.5, the memorandum of understanding or agreement shall be controlling without further legislative action, except that if any provision of the memorandum of understanding or other agreement requires the expenditure of funds, the provisions may not become effective unless approved by the Legislature.~~

~~SEC. 7. Section 11046 is added to the Government Code, to read:~~

~~11046. For purposes of this article and unless otherwise specifically stated, the following definitions shall apply:~~

~~(a) "Civil litigation" means any adjudicatory proceeding before an administrative or judicial body in which a state agency is interested or is a party as a result of the duties of the state agency.~~

~~(b) "Outside legal counsel" means an attorney who is authorized to practice law in this state and works in the private sector.~~

1     ~~(e) “State agency” means every state office, department,~~  
2     ~~division, bureau, board, commission, and every officer and~~  
3     ~~employee thereof. “State agency” does not mean the Regents of~~  
4     ~~the University of California, the Trustees of the California State~~  
5     ~~University, the Legislature, or the courts or any other entity within~~  
6     ~~the judicial branch of state government.~~

O